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For Publication

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In re:

**Michael F. Montagne,
Debtor.**

**Chapter 12 Case
08-10916**

Michael Montagne,

Plaintiff,

v.

**Ag Venture Financial Services, Inc.,
Defendant.**

Filed & Entered
On Docket
May 18, 2010

**Adversary Proceeding
08-1022**

**Ag Venture Financial Services, Inc.,
Plaintiff,**

v.

**Michael F. Montagne, et al.,
Defendants.**

**Adversary Proceeding
08-1023**

Appearances: *Jess T. Schwidde, Esq.*
 John R. Harrington, Esq.
 Rutland, VT & Concord, NH
 For Michael Montagne

Gary L. Franklin, Esq.
Douglas J. Wolinsky, Esq.
Burlington, VT
For Ag Venture Financial Services, Inc.

ORDER

**GRANTING IN PART & DENYING IN PART SUMMARY JUDGMENT TO AG VENTURE FINANCIAL SERVICES, INC.
AS TO REMAINING CLAIMS AND COUNTERCLAIMS OF MICHAEL MONTAGNE**

For the reasons set forth in the memorandum of decision of even date, IT IS HEREBY ORDERED that Ag Venture's motion for summary judgment on Michael Montagne's remaining claims and counterclaims (AP # 08-1023, doc. # 381; AP # 08-1022, doc. # 119) is GRANTED in part and DENIED in part.

Ag Venture's motion for summary judgment on Michael Montagne's counterclaim in adversary proceeding # 08-1023 for **breach of contract** is GRANTED and judgment shall be entered in favor of Ag Venture on the issue of whether Michael Montagne may obtain relief based on damages in the form of lost profits from the purchase of additional cows caused by Ag Venture's failure to properly disburse the

Loan # 321 loan proceeds. Ag Venture's motion for summary judgment on Michael Montagne's counterclaim for breach of contract is DENIED in other regards such that the parties may present evidence at trial on the following issues (unless the parties reach stipulations as to these matters before trial):

- (1) which contracts Michael Montagne claims Ag Venture breached;
- (2) whether Michael Montagne provided consideration or a reciprocal promise in exchange for Ag Venture's "best efforts" promise in the December 2006 agreement;
- (3) whether Ag Venture breached the Loan # 321 loan agreement by failing to disburse the loan proceeds as required by the loan agreement;
- (4) whether Ag Venture breached the Loan # 516 loan agreement by failing to disburse the loan proceeds as required by the loan agreement;
- (5) whether Ag Venture breached the December 2006 agreement by failing to use its best efforts to provide Michael Montagne with a refinancing of all his farm debt; and
- (6) whether as a result of Ag Venture's breach of contract Michael Montagne suffered damages in the form of loss of equity resulting from increase in debt service load, foreclosure of property, lost revenues from the sale of his cow herd, loss of the ability to obtain credit elsewhere, lawsuit and attachment by BBI, and increased income taxes resulting from sale of the herd.

Ag Venture's motion for summary judgment on Michael Montagne's counterclaim in adversary proceeding # 08-1023 for **breach of the implied covenant of good faith and fair dealing** is GRANTED.

Ag Venture's motion for summary judgment on Michael Montagne's counterclaim in adversary proceeding # 08-1023 for **negligence** is GRANTED and judgment shall be entered in favor of Ag Venture on the issue of whether Michael Montagne may obtain relief based on Ag Venture's conduct in connection with the underwriting of the loans at issue other than its conduct as financial advisor to Michael Montagne, and damages for emotional distress. Ag Venture's motion for summary judgment on Michael Montagne's counterclaim for negligence is DENIED as to whether Ag Venture owes a duty of care to Michael Montagne as his financial advisor that could give rise to the exception to the economic loss rule.

Ag Venture's motion for summary judgment on Michael Montagne's counterclaim in adversary proceeding # 08-1023 for **promissory estoppel** is DENIED. The parties may present evidence on this counterclaim at trial.


Ag Venture's motion for summary judgment on Michael Montagne's counterclaim in adversary proceeding # 08-1023 for **recoupment** is DENIED. The parties may present evidence on this counterclaim at trial.

Ag Venture's motion for summary judgment on Michael Montagne's claim in adversary proceeding # 08-1022 for **preferential transfer** is DENIED. The parties may present evidence on this claim at trial, after the Court determines whether the notes and account are enforceable.

IT IS FURTHER ORDERED that the parties may present evidence at trial on all material facts other than those offered in support of claims that were either (1) the subject of Ag Venture's motion for summary judgment that were granted, or (2) addressed at the mini-trial.

SO ORDERED.

May 18, 2010
Burlington, Vermont



Colleen A. Brown
United States Bankruptcy Judge